DATO' MOHAMED HASHIM SHAMSUDDIN *a*

v.

THE ATTORNEY-GENERAL, HONG KONG

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
GEORGE SEAH SCJ *b*
EUSOFFE ABDOOLCADER SCJ
[CIVIL APPEAL NO. 418 OF 1985]
16 JANUARY 1986

CRIMINAL LAW AND PROCEDURE: *Jurisdiction - High Court - Ex parte order - Recording of evidence - Criminal proceedings - Foreign Court - Order 66 r. 1 of the High Court 1980 - Sections 16(l), 25 of Courts of Judicature Act 1964 - Rules Committee - Order 1 r. 2(2), (3) of Rules of the High Court.* *c*

STATUTORY INTERPRETATION: *"In relation to a matter" - Definition of "matter" and "proceeding" in s. 3 of Courts of Judicature Act - Section 21(1) of Interpretation Act 1967 - Subsidiary legislation.* *d*

The appellant is one of the accused who is subject to criminal proceedings in Hong Kong. The Attorney General of Hong Kong had issued a letter in 1985, to the High Court, requesting that the evidence taken before the High Court be allowed to be used in a criminal proceeding pending in Hong Kong. This request was allowed and an *ex parte* order was made by the Chief Justice on 16 December 1985 under the provision of O. 66 r. 1 of the Rules of the High Court 1980 (RHC). The appellant then applied to set aside this *ex parte* order. Harun J *e* dismissed the appellant's application and the appellant then appealed to the Supreme Court.

The other person involved in the criminal proceedings in Hong Kong, one Lorrain Esme Osman, was not a party to the proceeding to set aside the *ex parte* order before Harun J Upon application by his Counsel to intervene in this appeal, his application was allowed in terms of Prayer 1 of his Notice of Motion only. *f*

The main contention of the appellant was that the High Court had no jurisdiction to make an order under O. 66 of the RHC in relation to criminal proceedings. Order 1 r. 2(2) and (3) were also referred to in this regard. The appellant also contended that there was no statutory source or enabling provision to empower the Court to order evidence to be recorded for the purpose of criminal proceedings in a foreign Court. Another ground of appeal was that for O. 66 to apply, there must be pending proceedings in the foreign Court in question. However, *g* since the affidavits filed in these proceedings did not disclose this, O. 66 was inapplicable.

Held:

[1] (By the Court., George Edward Seah SCJ dissenting)

(a) The phrase "in relation to a matter" in r. 1(1) of O. 66 connotes the application of that Order to criminal as well as civil matters as although "matter" is not defined in *h* the RHC, the latter were enacted under the Courts of Judicature Act 1964 (the 1964 Act) and constitute subsidiary legislation thereunder and the definition of "matter" read with that of "proceeding" in s. 3 of the 1964 Act which clearly includes criminal proceedings applies equally to the provisions of the RHC by virtue of s. 21(1) of the Interpretation Act 1967 which provides that terms and expressions used in subsidiary legislation have the same meaning as in the written law under which it *i*

was made. The provisions of para (2) of r. 1 furthermore wholly substantiate this construction by specifically excepting the power of the Registrar to make such orders in relation to criminal matters.

(b) Order 1 r. 2(B) of RHC in specifically providing an exception to the provisions of para. (2) of that rule categorically permits the application of the RHC or any provisions thereof in relation to the proceedings specified in r. 2(2).

(c) The statutory source and enabling provision for O. 66 of RHC is s. 16(*l)* of the 1964 Act. Section 16 (*l*) of the 1964 Act must be read disjunctively in the light of the comma after the words "letters of request" which is significantly followed by the conjunction "and". The provisions of para (*l)* of s. 16 relating to the regulation of the taking of evidence by letters of request apply equally to civil and criminal proceedings, and the provisions of s. 20 of the Extradition Ordinance do not in any way detract from this position. The reference to letters of request in s. 16(*l)* clearly connotes the taking of evidence in aid of foreign Courts in relation to matters pending before them.

[2] per Salleh Abas LP: "The statutory powers of the High Court in addition to s. 16 can also be found in s. 25 of the 1964 Act." After an examination of the history of the legislation on which the 1964 Act is modelled upon, His Lordship said, "thus the provision of s. 25(1) of the 1964 Act takes effect in that the High Court has this power to issue and act upon letters of request.".

[3] On the question of pending proceedings in the foreign Court, it was held by Abdoolcader SCJ that there was in fact sufficient indication of pending proceedings in Hong Kong. The order of 16 December 1985 was therefore held to have been made in relation to a matter pending before a Court in Hong Kong.

[4] Observations on the applicability of the United Kingdom Evidence by Commission Act 1859 (the U.K. Act)

per Abdoolcader SCJ: "... I am not satisfied that the imperial legislation referred to is in fact existing law within the connotation thereof in Articles 160 and 162 of the Constitution of Malaysia particularly having regard to certain pertinent provision in the constating instruments we have been referred to which I do not think it is however necessary to delve into."

per George Edward Seah SCJ: "... If these Imperial Acts applied in Malaya following the signing of the Malayan Union Order in Order 1946, I am of the opinion that it ceased to exist after the Federation of Malaya Order in Council 1948 came into effect. It follows that these Imperial Acts were not in force immediately prior to Malaysia Day."

[Appeal dismissed. Costs to be paid to the respondent by appellant and intervener.]

Cases referred to:
SS. Hontestroom v. SS. Sagaporack [1927] AC 47
Donald Campbell-Co. v. Pollak [1927] AC 804
Attorney-General v. Sillem [1964] 11 ER 1200
Britain v. Rossiter [1879] 11 QBD 123
British South Africa Co. v. Compania de Mocambique [1893] AC 602
Barraclough v. Brown [1897] AC 615
Guaranty Trust Company of New York v. Hannay & Co. [1915] 2 KB 536

Mitchell v. Harris Engineering Co. Ltd. [1967] 2 QB 703
R.v. County Court Judge of Essex [1887] 18 QBD 704
Wolverhampton New Waterworks Co. v. Hawkesford [1859] 141 ER 495
Hanlon v. Law Society [1981] AC 124
Re Steel (deceased), Public Trustee v. Christian Aid Society [1979] Ch 218
Marshall v. Cottingham [1981] 3 All ER 8

Legislation referred to:
Courts of Judicature Act 1964, ss. 2, 3, 16(*l*), 17, 22, 23, 24, 25(1), (2), 26, 27, 80
Evidence by Commission Act 1859 [UK], s. 5
Extradition Act 1870 [UK], ss. 20, 24
Extradition Act 1873 [UK], s. 5
Extradition Ordinance 1958, s. 20
Federal Constitution, Acticles 160, 162
Courts Ordinance 1948, ss. 2, 75, 99A
Interpretation Act 1967, ss. 3, 21(1)
Malaysia Act 1963, s. 73(1)
Merdeka Constitution, Article 162(1)
Rules of the High Court 1980, O. 1 rr. 2, 2(2), (3), O. 52, O. 54, O. 66 r. 1(2), O. 67, O. 69, O. 70, O. 71, O. 73, O. 74, O. 75, O. 76, O. 77, O. 78, O. 79, O. 83, O. 85, O. 86, O. 87, O. 88
Rules of the Supreme Court 1883 [UK] O. xxv r. 5
Rules of the Supreme Court 1965 [UK] O. 25 r. 5
Supreme Court of Judicature (Consolidation) Act 1925 [UK], s. 99

For the appellant - R.R. Sethu (N. Chandran and V.T. Ravindran with him); M/s. Adnan Sundra & Low
For the intervener - M.S. Murthi; M/s. Fernandez & Co.
For the respondent - Clive Nicholls Q.C.; (C.K. Yeoh, S.K. Yeoh, Lee Lay Ann and Suhendran Sockanathan with him); M/s. Chooi & Co.

JUDGMENT

Salleh Abas LP:

Each of us has a separate judgment. My judgment is complementary of that of my learned brother Tan Sri Dato E. Abdoolcader, with whom I agree.

This is an appeal from the decision of Harun J dismissing the appellant's application to set aside an *ex parte* order given by the Chief Justice allowing for the taking of evidence before the High Court upon a letter of request issued by Hongkong High Court; such evidence to be used in a criminal proceeding pending in Hongkong and the evidence is to be recorded before Harun J himself.

The appellant is one of the accused who are subject to the criminal proceedings in Hongkong. Another person is Lorrain Esme Osman. He was not a party to the proceeding to set aside the *ex parte* order before Harun J. Upon application by his Counsel to intervene in this appeal we allowed his application in terms of prayer one of his Notice of Motion only.

The impugned *ex parte* order was made under the provision of O. 66 r. 1 of the Rules of the High Court 1980.

Mr. R.R. Sethu for the appellant submitted that the impugned order is bad and must be set aside because, firstly O. 66 r. 1 does not apply to a matter in relation to criminal proceedings and secondly there is no statutory authority empowering the High Court to make the impugned order. According to him O. 66 being a rule of Court confers no power upon it to make the order, nor is there any provision for this purpose to be found in the Courts of Judicature Act. Mr. M.S. Murthi for the intervener adopted Mr. R.R. Sethu's argument.

I have the benefit of reading the judgment of my learned brother Tan Sri Eusoffe Abdoolcader. I agree with his judgment and conclusion on both the questions.

In my judgment I wish only to add that the statutory powers of the High Court in addition to s. 16(2) can also be found in s. 25.

The present High Court is the same as the High Court which was established under the Scheme of the Federation of Malaya Agreement 1948 (Clause 77). At present the High Court is governed by the Courts of Judicature Act 1964 (Act 91), whilst previously it was governed by a Federation of Malaya (FM) Ordinance, i.e., the Courts Ordinance 1948. This Ordinance was passed pursuant to Clause 77 of the FM Agreement reaffirming the establishment of the High Court and when the country achieved Independence in 1957, the Ordinance continued to be in force without modification at all."

The question which I have to address my mind to is whether the High Court then established under the 1948 Ordinance had the power to act upon letters of request issued by foreign Courts. If it had, a further question will arise as to whether after the formation of Malaysia that power continued to be vested in the Court.

The 1948 Ordinance established a composite Supreme Court consisting of the High Court and the Court of Appeal. The Ordinance set out the original criminal and civil jurisdiction of the High Court in its First and Second Schedules respectively. It also made provisions in s. 99A to the effect that "the Supreme Court ... shall have the further powers and jurisdiction set out in the Third Schedule to this Ordinance". The Third Schedule consisted of 26 paragraphs, one of which, being the relevant one for the purpose of this appeal is para. 13 which is as follows:

> The High Court may, on application made in the manner prescribed by Rules of the Supreme Court, issue commissions and letters of request and may execute commissions and act upon letters of request issued by foreign Courts.

No modification to the Ordinance was made upon the country obtaining Independence in 1957. Least of all the power to issue and act upon letters of request to and from foreign Courts. The result was that on and after Merdeka Day the High Court continued to have this power.

Consequent upon the formation of Malaysia in September 1963, the parts of the 1948 Ordinance which dealt with the Supreme Court were repealed and reenacted by the Judicature Act 1964 which changed the Court of Appeal into a separate Court called the Federal Court and dropped the nomenclature "Supreme Court". Likewise the Act sets out the criminal jurisdiction of the High Court, both original and appellate (s. 22 & s. 26), and civil jurisdiction, original and appellate (ss. 23 & 27). It also sets out the Court's civil jurisdiction in certain specific matters, such as divorce and matrimonial causes, admiralty matters, bankruptcy, guardianship of infants and mentally retarded persons and their properties, probate of wills and letters of administration (s. 24). In addition to all these powers and jurisdiction, s. 2 specifically enacts:

> (1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which are vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.
>
> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:

> Provided that all such powers shall be exercised in accordance with any written law or rules of Court relating to the same.

Pausing at this point for a moment, it is at once clear that the High Court has three types of powers, namely:

(i) those which are vested in the Court immediately prior to Malaysia Day;

(ii) those which may be vested in it by written law in force; and

(iii) those powers described as additional powers set out in the Schedule.

The Schedule to the Act contains a list of powers described by s. 25(2) as additional powers. The Schedule omits mentioning the Court's power to issue and act upon letters of request, which power, as we have seen, was included amongst the additional powers of the Court under the 1948 Ordinance. Is this omission so material as to deprive the High Court of the power it once had? Or, simply has the High Court now lost this power? Or, must such power be expressly stated in the Schedule so that silence means absence of such power?

To deal with these questions, I think it is necessary to go back to the history of legislation. When the 1948 Ordinance was first passed and came into force on 1 February 1949, the Ordinance then had three Schedules. The First Schedule dealt with original jurisdiction of the High Court, but the Third Schedule, by virtue of s. 75, was exclusively setting out additional powers of Sessions Courts in the Settlements (Penang and Malacca). However, on 1 September 1951 the Courts (Amendment) Ordinance No. 29 of 1951 introduced a new section, i.e., s. 99A, and substituted a new Third Schedule for the original one. The new Third Schedule mentioned amongst other things this particular power with which this appeal is concerned. However, the wording of s. 99A on account of which the new Third Schedule was substituted is most interesting and is as follows:

> In amplification and not in derogation of the powers conferred by this Ordinance or inherent in any Court, and without prejudice to the generality of any such powers, the Supreme Court and every Sessions Court and Magistrates' Court shall have the further powers and jurisdiction set out in the Third Schedule to this Ordinance.

The result is that the so-called further powers in the Third Schedule unless the context otherwise required were not just available to Sessions Courts in Penang and Malacca, but also exercisable by all subordinate Courts, wherever they were and by the High Court. But as regards the power to issue and act upon letters of request under para. 13, this was made clear by the context that it was only exercisable by the High Court and this power was vested in it since the commencement of the Ordinance and thus regarded as an integral part of the Court's powers from the very beginning.

Now, has the Court lost it or still retained it upon the coming into force of the Courts of Judicature Act 1964?

Section 80 of the 1964 Act repealed part of the Third Schedule to the 1948 Ordinance which related to the further powers of the High Court. One of the repealed provisions is para. 13 which deals with the High Court's power to issue and act upon letters of request. Hence this power disappears from the list of additional powers set out in the First Schedule to the 1964 Act.

This repeal, in my view, is of no consequence to the power of the High Court in this regard, because this power was really referred to by s. 99A of the 1948 Ordinance as "the further powers" and not as "additional powers". But the real test to be applied is whether this power

was vested or not in the Court immediately prior to Malaysia Day. If so, the High Court has this power. That this power was vested before Merdeka Day is beyond dispute and that it continued to be so vested up to the first second of the first hour of Malaysia Day is also clear; there being no legislation otherwise than the 1964 Act itself. Thus the provision of s. 25(1) of the 1964 Act takes effect in that the High Court has this power to issue and to act upon letters of request. Since the Court retains it by virtue of s. 25(1) I cannot see how by s. 80 which purports to repeal it and is thus omitted from the list of additional powers described in s. 25(2) and the First Schedule the Court has lost it. This seeming contradiction appears to be absurd. But in my view it is not material as it can be reconciled if we bear in mind the classification of Court's powers into three categories described above. The purported repeal by s. 80 thus only affects the classification or name of this power. It is a repeal which was necessary to tidy up the legislation since this power has become one of the powers vested in Court immediately before Malaysia Day. In other words, the repeal is consequential and cosmetic only. It affects only the change in nomenclature of the power. That being the case, the power continues to be available to the Court. It must also be observed that the additional powers of the Court stated by s. 25(2) are to be "Without prejudice to the generality of" the power which were transmitted to the Court on Malaysia Day; i.e., powers vested in it immediately before that Day and those vested by any written law in force. Thus under no circumstances could s. 25(2) narrow down the two types of powers vested in the Court on Malaysia Day by virtue of s. 25(1).

Further, it would be the height of absurdity to interpret the Courts' powers as being diminished as a result of the formation of Malaysia. There is no rhyme or reason why on the Malaysia Day they should be reduced. Logic demands that they should be augmented or at least maintained.

It is also interesting to see how the so-called additional powers were introduced in the 1948 Ordinance by s. 99A thereof (*supra*). The powers were described by the section as "the further powers" and these were "in amplification" of the powers conferred by the Ordinance or "inherent in any Court". Neither in derogation nor prejudicing the generality of the powers expressly conferred. It seems therefore that even without an express provision in the statute regarding this matter, the Court seems to have it and have it since the commencement of the 1948 Ordinance. It is a sort of power that should be implied or amplified from the very nature of judicial powers expressly conferred upon the Court; its express mention being merely declaratory of the existence of the power, and thus its silence does not mean the disappearance of its existence.

Mr. Nicholls for the respondent submitted that the power of the Court regarding letters of request is to be found in the United Kingdom Evidence by Commission Act 1859, which in his view was made applicable as part of the law of this country by the Malayan Union Order-in-Council 1946. The applicability of this imperial Act, he argued, was extended by Clause 87(4) of the Order-in-Council by declaring that the enactment in the First Schedule to the U.K. Foreign Jurisdiction Act 1890 was applicable to the territory of the Malayan Union. Among the enactments was the Evidence by Commission Act 1859. Upon replacement of the Malayan Union Order-in-Council by the Federation of Malaya Order-in-Council 1948, he submitted, the Evidence by Commission Act 1859 became part of the "existing laws" which were retained by this latter Order-in-Council. This Act was further preserved by Article 162(1) of the Merdeka Constitution in 1957 upon the country gaining independence and further preserved to the present day by s. 73(1) of the Malaysia Act 1963, when Malaysia was formed.

There seems to be some interesting points he made in this submission, but I do not think that it is necessary to deal with it in view of the conclusion and reasoning which I have reached in this appeal.

I therefore dismiss this appeal with costs and direct that the deposit be paid to the respondent on account of taxed costs and that the costs be paid by both appellant and Intervener.

Edward George Seah SCJ:

This is an appeal against the dismissal by Harun J to set aside a Court Order dated 16 December 1985. The appellant is Dato' Mohamed Hashim Shamsuddin and the Attorney-General of Hong Kong is the respondent. At the hearing of this appeal, leave was given to Lorrain Esme Osman, one of the parties to these proceedings, to intervene. At this stage, I like to dispose of the alternative submission of learned Counsel for the respondent with regard to the English Evidence by Commission Act 1859 as amended by Evidence by Commission Act 1885. If these Imperial Acts applied in Malaya following the signing of the Malayan Union Order in Order 1946 I am of the opinion that it ceased to exist after the Federation of Malaya Order in Council 1948 came into effect. It follows, that these Imperial Acts were not in force immediately prior to Malaysia Day. This alternative submission therefore fails.

Having disposed of the alternative submission of learned Counsel for the respondent I think it is not the controversy that there is no Malaysian Legislation expressly, or by necessary implication, vesting jurisdiction in the High Court to make an Order in terms of O. 66 r. 1 of the Rules of the High Court 1980. In my opinion, the common law does not confer such jurisdiction on the High Court either. But the learned Judge appears to rely on O. 66 r. 1(2) when he refused to discharge the Court Order made on 16 December 1985. Order 66 r. 1 reads:

> 0.66 r.1(1) Subject to para. (2), the power of the High Court or a Judge thereof to make, in relation to a matter pending before a Court or tribunal in place outside the jurisdiction, orders for the examination of witnesses and for attendance and for production of documents and to give directions may be exercised by the Registrar.
>
> (2) The Registrar may not make such an order if the matter in question is a criminal matter.

It is common ground that the Rules of the High Court 1980 are made by the Rules Committee constituted under s. 17 of the Courts of Judicature Act 1964 (hereinafter referred to as the Act). The power to make rules is vested in the Rules Committee under the provisions of s. 16 of the Act and sub-paragraph (5) of s. 17 provides that the "Rules of Court shall be laid before the Dewan Rakyat at the first meeting after their publication and may be disapproved in whole or in part by a resolution of the Dewan Rakyat". Being made under powers given by a statue, the Rules of the High Court 1980 have themselves the force of statute (see *SS. Hontestroom v. SS. Sagaporack* [1927] AC 47 per Lord Summer and *Donald Campbell Co. v. Pollak* [1927] AC at p. 804 per Viscount Cave) **but in matters of procedure only**, though they cannot confer any new jurisdiction when none existed before or enlarge the jurisdiction, or create or alter substantive rights (see *Attorney-General v. Sillem* [1864] 11 ER 1200, *Britain v. Rossiter* [1879] 11 QBD 123, *British South Africa Co. v. Compania de Mocambique* [1893] AC 602, *Barraclough v. Brown* [1897] AC 615, *Guaranty Trust Company of New York v. Hannay & Co.* [1915] 2 KB 536 and *Mitchell v. Harris Engineering Co. Ltd.* [1967] 2 QB 703).

I will say a few words about the English Judicature Acts.

In 1925 the Supreme Court of Judicature (Consolidation) Act 1925 was passed to consolidate the several English Judicature Acts enacted between 1873 to-1910-and the general power to make Rules of Court is now contained in s. 99 of the 1925 Act. It appears that s. 16 of the Courts of Judicature Act 1964 is in *Pari Materia* with the first part of s. 99 except that sub-paragraph (*l*) of s. 16 does not appear in s. 99 of the 1925 Act. This omission does not, in my opinion, affect this judgment. Now, the first Rules of the English Rules of the Supreme Court were drafted by the Judges of the new High Court and the Court of Appeal and appeared as the First Schedule to the Judicature Act 1873 or 1875. They were developed and enlarged and re-issued in 1883 as the Rules of the Supreme Court 1883. The 1883 Rules are now replaced by the Rules of the Supreme Court 1965.

In my opinion, English cases are therefore relevant in interpreting s. 16 of the Act as well as O. 66 r. 1 of the Rules of the High Court 1980, replacing the former Rules of the Supreme Court 1957. I think it cannot be disputed that the former 1957 Rules were based on the 1883 English Rules of the Supreme Court and the present 1980 Rules are modelled on the 1965 English Rules of the Supreme Court.

I will now proceed to deal with the English authorities which I have cited.

In *Attorney-General v. Sillem (supra)* Lord Wrenbury LC said at p. 1208:

> As power to regulate the practice of a Court does not involve or imply any power to alter the extent or nature of the jurisdiction.

In *Britain v. Rossitter* (*supra*) Brett LJ said at p. 129:

> I think that the true construction of the Judicature Acts is that they confer no new rights; they only confirm the rights which previously were found to be existing in the Courts either of Law or Equity; if they did more, they would alter the rights of parties, whereas in truth they only change the procedure.

In *British South Africa Co. case* at p. 628 Lord Herschell LC said:

> It (O. 36 r. 1 of the 1883 Rules of Supreme Court) deals only with the place of trial, and enables actions, whatever their nature, to be tried in any county. But it is, in my opinion, a mere rule of procedure, and applies only to those cases in which the Courts at that time exercised jurisdiction. It has been more than once held that the rules under the Judicature Acts are rules of procedure only and were not intended to affect and did not affect, the rights of parties."

At p. 629 the Lord Chancellor continued that "the rules of procedure under the Judicature Acts have not conferred a jurisdiction which did not exist before."

In *Barraclough case* I like to quote a dictum of Lord Davey which appears at p. 624:

> It would obviously be incompetent for the Judges or the Rule Committee under a power to make rules of procedure to give the Court power to deal with a matter which is outside its jurisdiction. The rule relates to procedure only and must be so construed.

In *Guaranty Trust Company of New York case,* the Court of Appeal was dealing with O. 25 r. 5 of the Rules of the Supreme Court 1883 which reads:

> No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations or right whether any consequential relief is or could be claimed or not.

At p. 563 Pickford LJ said:

> If it adds to the jurisdiction in the first sense of giving power to deal with matters which could not in any sense or under any circumstances be entertained it is *ultra vires,* and it is to this stage of things that remark of Lord Davey in *Barraclough v. Brown* were addressed. But if its only effect is to provide that the Court may deal with a matter with which it can already deal in a different manner under different circumstances and when brought before it by a different person, it is, in my opinion, only dealing with practice and procedure and is *intra vires.* The latter, in my opinion, is the position in this case.

At p. 570 Bankes LJ said:

> They (Rule Committee) made O. XXV r. 5. The Order extends the previous practice, just as the statute of 1852 had done; but in my opinion the extension in each case was an extension of the practice and procedure of the Court; and subject to the limitation to which I refer later, the extension contained in O. XXV r. 5 was, in my opinion, one which the Rule Committee were competent to make.

In *Mitchell case* the Court of Appeal was concerned with the challenge as to the validity of O. 20 r. 5 of the Rules of the Supreme Court 1965 and at p. 718 Lord Denning M.R. said:

> In my opinion, whenever a writ has been issued within the permitted time, but is found to be defective, the defendant has no right to have it remained defective. The Court can permit the defect to be cured by amendment: and whether it should do so depends on the practice of the Court. It is a matter of practice and procedure. As such it can be altered by the Rule Committee under s. 99(1)(a) of the Supreme Court of Judicature (Consolidation) Act 1925. That is what has been done by O. 20 r. 5(2), (3), (4) and (5) ...

Russell LJ said similar view at p. 720: " ... I accept that the Rules of the Supreme Court are limited to matters of practice and procedure, which have been said to be convertible terms. Section 99 of the Judicature Act of 1925 is concerned with such matters and is in Part IV which is cross-headed "General Provisions as to Trial and Procedure"."

Learned Counsel for the respondent has not been able to cite or produce any decision by the House of Lords to contradict any of the cases which I have referred to. It seems to me therefore, that there is no authority against, and a great many authorities in favour of the proposition that the Rules of the Court are made and can only be validly made by the Rules Committee to regulate the practice and procedure to be followed in the High Court and any matter relating to such practice and procedure therein under s. 16 of the Act.

Apart from these authorities, in my opinion, the same conclusion would also be reached on a literal construction of the relevant sub-paragraphs of s. 16 of the Act. Section 16 reads:

> Rules of Court may be made for the following purposes:
>
> (a) for regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the High Court and the Supreme Court in all **causes** and **matters** whatsoever in or with respect to which those Courts have for the time being jurisdiction (including the procedure and practice to be followed in the registries of those Courts), and any matters incidental to or relating to any such procedure or practice, including (but without prejudice to the generality of the foregoing provision) the manner in which, and the time within which, any applications which are to be made to the High Court or to the Supreme Court shall be made;
>
> (l) for regulating the taking of evidence before an examiner or on commission or by letters of request, and for prescribing the circumstances in which evidence so taken may be read on the trial of an **action**;
>
> (p) for any purpose for which rules of Court may be made under any written law.

For the purpose of this appeal, in my opinion, only the abovementioned sub-paragraphs need be quoted.

Now, "action" has been defined by s. 3 of the Act to mean "a civil proceeding commenced by writ or in such other manner as is prescribed by rules of Court, but does not include a criminal proceeding". "Cause" includes any action, suit or other original proceeding between a plaintiff and defendant and any criminal proceeding. And "matter" includes every proceeding in Court not in a cause.

Although the phrase "Rules of Court" contained in s. 16 and s. 17 has not been defined by s. 3 of the Act but it has been defined by the Interpretation and General Clauses Ordinance 1948 and the Interpretation Act 1967. The 1948 Ordinance defines "Rules of Court" in s. 2 to mean, when used in relation to any Court, rules made by the Rule Committee. And s. 3 of the 1967 Act defines "Rules of Court to mean rules or other subsidiary legislation regulating the practice and procedure of a Court or Courts.

In my opinion, it is plain that s. 16 of the Act deals with the practice and procedure of the High Court and the Supreme Court subject to the provisos contained in (a) and (b) of sub-section (3) of s. 17 of the Act. Section 16 does not deal with the general jurisdiction of the High Court. As such in my opinion, the power given to the Rules Committee is limited only to making rules regulating and prescribing the practice and procedure to be followed in the Courts.

Next, learned Counsel for the appellant argued that s. 16 of the Act does not empower the Rules Committee to make Rules of Court relating to criminal proceedings. The short answer to this submission is that having regard to s. 3 of the Act which defines "cause" to include "criminal proceedings", I am of the opinion that there is no merit in this contention.

It was further argued that since the word "action" contained in sub-paragraph (*l*) of s. 16 of the Act does not include criminal proceedings under the definition section, the Rules Committee have no power to make Rules of Court regulating criminal proceedings under this sub-paragraph. For the respondent, learned Counsel submitted that sub-paragraph (*l*) does confer power on the Rules Committee to make Rules of Court regulating to criminal proceedings if the sub-paragraph is to be read disjunctively. I do not agree with this submission. In my opinion, the first part of sub-paragraph (*l*) relates to making **Rules of Court** "to regulate the taking of evidence before an examiner or on commission or by letter of request" and the second part relates to "prescribing the circumstances in which evidence so taken may be read on the trial of an action" (emphasis made). It is clear that the second part is intrinsically linked to the first part and the whole sub-paragraph (*l*) should be read together. So construed, I am inclined to agree with the contention of learned Counsel for the appellant that under sub-paragraph (*l*) of s. 16 of the Act the power of the Rules Committee to make Rules of Court is confined to civil proceedings only. In my opinion, the Rules Committee are not competent to make Rules of Court relating to criminal proceedings under this sub-paragraph. A *fortiori*, the Rules Committee have no power to make Rules of Court to be followed in the High Court regulating the practice and procedure in respect of criminal proceedings pending in a foreign Court or tribunal. A careful study of the various sub-paragraphs contained in s. 16 of the Act reveals that the Rules Committee do not and cannot claim to have such power inasmuch as there is nothing in s. 16 to indicate expressly, or by necessary intendment, that extra-territorial power is given to the Rules Committee. In my opinion, the Court of Judicature Act 1964 does not purport to have extra-territorial operation. It follows that the Rules Committee cannot have power wider than the Act. As Lord Halsbury rightly said in the case of *British South Africa Co. case* at p. 630:

Rules of procedure and practice in England would not, I think in the contemplation of anyone, touch questions of territorial or international jurisdiction.

As the Rules Committee have no legislative authority it follows that they have no power to enact Rules of Court purporting to confer, enlarge or create new jurisdiction on the High Court in terms of O. 66 rr. 1(1) and (2) of the Rules of the High Court 1980. As to the question whether or not the Rules Committee have power to make Rules of Court regulating civil proceedings pending in a foreign Court under sub-paragraph (l) of s. 16 of the Act, I should, as at present advised, not be prepared to offer any opinion since the issue does not seem to arise in this appeal.

Next, it is clear O. 66 r. 1 of the Rules of the High Court 1980 does not deal with the ordinary practice and procedure of the High Court but that it purports to confer new jurisdiction on the High Court to deal with the matters therein mentioned.

Now, the corresponding provision of the English Rules of the Supreme Court 1965 is O. 70 which makes specific reference to The Foreign Tribunals Evidence Act 1856, The Evidence by Commission Act 1859 and the Extradition Act 1870. Order 70 reads:

0.70 r.1(1) Subject to para. (2) the power of the High Court or a Judge thereof under the Foreign Tribunals Evidence Act 1856, or the Evidence by Commission Act 1859, to make, in relation to a matter pending before a Court or tribunal in a place outside the jurisdiction, orders for the examination of witnesses and for attendance and for production of documents and to give directions may be exercised by a master of the Queen's Bench Division.

(2) A master may not make such an order if the matter in question is a criminal matter and accordingly may not make an order under the said Act of 1856 as extended by s. 24 of the Extradition Act 1870.

The 1856 Act is an Act to provide for taking evidence in Her Majesty's Dominions in relation to civil and commercial matters pending before Foreign Tribunals. The Act was extended by s. 24 of the 1870 Act so as to apply to criminal matters other than those of a political nature.

The 1859 Act, on the other hand, is an Act to provide for taking evidence in suits and proceedings pending before tribunals in Her Majesty's Dominions in places out of the jurisdiction of such tribunals. This Act may be applied by Order in Council to any foreign country in which Her Majesty has jurisdiction as if that country were a British possession (see Foreign Jurisdiction Act 1890 s. 5 and First Schedule).

On the other hand, O. 66 r. 1 makes no mention to any written law. In the absence of any empowering statute, in my opinion, the Rules Committee are not competent to confer this jurisdiction on the High Court under sub-paragraph (*l*) of s. 16 of the Act. In England, the empowering Acts giving statutory jurisdiction to the High Court to act under O. 70 are the Foreign Tribunals Evidence Act 1856, the Evidence by Commission Act 1859 and the Extradition Act 1870. Here there is no empowering Act.

Reliance is placed on the following Rules of the High Court 1980, viz. O. 67, O. 69, O. 71, O. 73, O. 74, O. 75, O. 76, O. 77, O. 78, O. 79, O. 83, O. 84, O. 85, O. 86, O. 87 and O. 88.

In a recent decision of the Supreme Court Civil Appeal No.23 of 1985 delivered on 30 December 1985 (unreported) the plaintiffs sued and obtained judgment against the defendant company incorporated in the State of Sarawak, in the Brunei High Court. Although notice of appeal was filed by the defendant it was subsequently discontinued. As the defendant do not appear to have any assets in the State of Brunei and as Brunei High Court is not included in the First Schedule to the Reciprocal Enforcement of Judgments Act 1958 the plaintiffs

were compelled to institute fresh legal action in the High Court at Miri and judgment was given summarily in favour of the plaintiffs under O. 14 of the Rules of the High Court 1980 based on the judgment obtained in the Brunei High Court. An appeal by the defendant was dismissed by the Supreme Court. This judgment of the Supreme Court is authority for the proposition that notwithstanding the provisions of O. 67 of the Rules of the High Court 1980 the plaintiffs must establish that the Brunei High Court is a designated High Court in the First Schedule to the Reciprocal Enforcement of Judgments Act 1958 before they could successfully apply for registration of a foreign judgment in Malaysia.

In my opinion, since the common laws do not appear to give any jurisdiction to the High Court to order a witness within its jurisdiction to appear and be examined on oath, or to produce documents relating to a criminal proceeding pending in a foreign Court or tribunal it seems to me that the English Parliament found it necessary to enact all these abovenamed 3 Acts in order to invest the High Court with the requisite statutory powers and jurisdiction (which were not available at common law) for the proper administration of justice. In my opinion, the jurisdiction of the High Court under O. 70 can be traced to these Acts of Parliament. Without them, I am of the opinion that the English Rule Committee can have no power to create this jurisdiction on the High Court in England under O. 70.

It seems to me that immediately prior to Malaysia Day the written law in force relevant to this case was the Extradition Ordinance 1958 which appeared to have been enacted after Merdeka Day, viz. 31 August 1957. I think this ordinance applied and still applies throughout the Federation of Malaysia. This ordinance does not contain any provision similar to s. 24 of the English Extradition Act 1870. However, s. 20 contains the following words:

> 20(1) The Minister may, by order his hand and seal, require a Magistrate to take evidence for the purposes of any criminal matter pending in any Court or Tribunal in any foreign country, and the Magistrate, upon the receipt of such order, shall take the evidence of every witness appearing before him for the purpose in like manner as if such witness appeared on a preliminary enquiry into the case of a person accused of an offence triable by the High Court and shall certify at the foot of the depositions so taken that such evidence was taken before him and shall transmit the same to the Minister. Such evidence may be taken in the presence or absence of the accused persons, if any, and the fact of such presence or absence shall be stated in such depositions.
>
> (2) Any person may, after payment or tender of a reasonable sum for his costs and expenses in this behalf, be compelled for the purposes of this section to attend and give evidence and answer questions and produce documents in like manner and subject to the like conditions as he may for the purposes of a preliminary enquiry into the case of a person accused of an offence triable by the High Court and every such person shall in respect of all evidence and answers given by him be legally bound to state the truth.
>
> (3) Nothing in this section shall apply in the case of any criminal matter of a political character.

It appears that s. 20 is lifted out from s. 5 of the English Extradition Act 1873 and that s. 5 extends the powers given s. 24 of the English Extradition Act 1870.

When the Dewan Rakyat passed the 1958 Ordinance Parliament must be deemed to be aware of s. 24 of the Extradition Act 1870 and s. 5 of the Extradition Act 1873. Nevertheless, the Legislature appeared to have considered and eventually rejected s. 24 in preference to s. 5 of the 1873 Act. Now, in the case of *R. v. County Court sue of Essex* [1887] 18 QBD 704 at p. 707 Lord Esher M. R. said:

> The ordinary rule of construction applies to this case, that where the legislature has passed a new statute giving a new remedy, that remedy is the only one which can be pursued.

in *Barraclough v. Brown* (*supra*) where a statute gives a right to recover expenses in a Court of summary jurisdiction from a person otherwise liable, there is no right to come to the High Court for a declaration in a Court of summary jurisdiction. At p. 622 Lord Watson

> The right and the remedy are given *uno faltu,* and one cannot be dissociated from the other. By these words the legislature has, in my opinion, committed to the summary Court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine to whom the amount is payable, and has therefore by plain implication enacted that no other Court has any authority to entertain or decide these matters.

In *Wolverhampton New Waterworks Co. v. Hawkesford* [1859] 141 Willes J formulated three propositions in which liability may be established by statute and for the purpose of this appeal, only proposition No. 3 need be referred to, *viz*:

> 3. The third class is where a statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it.

With respect to that class it has always been held that the party must adopt the form of remedy given by the statute.

It is difficult to resist the impression that resorting to the High Court was intentionally omitted by the Legislature as not being expedient when the High Court do not appear to have any jurisdiction or power to compel a witness resident in Malaysia to attend criminal trials to be held in a foreign country. It is not the function of the judiciary to question the wisdom of this course of action; our constitutional duty is to interpret and apply the law as enacted by Parliament. In my opinion, these cases aptly apply here and that the Legislature have intended the statutory remedy contained in s. 20 of the Extradition Ordinance 1958 to be exclusive.

Moreover, in my judgment, the remedy provided by s. 20 of the Extradition Ordinance 1958 is clearly not available at common law and applying the principle established by these cases to the facts of this case, the general rule seems to be that where a particular procedure has been prescribed by statute that procedure must be followed and that performance cannot be enforced in any other manner even by resorting to proceedings in the High Court. I must make it abundantly clear that I am not suggesting for a moment that the respondent should apply under the provision of s. 20 of the Extradition Ordinance 1958 but merely to point out that the Legislature did make provision for such eventuality and there does not seem to be a *lacuna* in the law.

In my opinion, *Attorney-General v. Sillem* (*supra*) is authority for the proposition that Rules of Court are subject to challenge and judicial review. See also *Mitchell v. Harris Engineering Co. Ltd.* (*supra*).

To summarise, in my opinion:

(1) Section 16 of the Act only empowers the Rules Committee to make rules of Courts regulating and prescribing the practice and procedure to be followed in the High Court and the Supreme Court and any matters relating to such practice and procedure;

(2) That the Rules Committee have power to make rules of Courts extending to both civil and criminal proceedings in Malaysia;

(3) That under sub-paragraph (1) of s. 16 of the Act the Rules Committee are competent to make rules regulating the practice and procedure in respect of civil proceedings only and that the Rules Committee do not have the power to make rules of Courts relating to criminal proceedings under this sub-paragraph;

(4) That the Rules Committee do not and cannot have the power to enact rules of Courts prescribing the practice and procedure to be followed in the High Court in respect of criminal proceedings pending in a foreign Court or tribunal;

(5) In the absence of an empowering Act or Acts of Parliament, the Rules Committee have no power to enact O. 66 rr. 1(1) and (2) of the Rules of the High Court 1980 purporting to confer or create new jurisdiction in the High Court to deal with matters stated therein when such jurisdiction did not exist before. Nor can the Rules Committee purport to enlarge the jurisdiction of the High Court inasmuch as such a jurisdiction cannot be made by a rule or an order of the Rules Committee;

(6) As regards O. 66 rr. 1(1) and (2) it merely indicates the practice and procedure to be followed in the High Court if and when such jurisdiction is vested in the High Court by an Act of Parliament or by an empowering Act. In other words, it facilitates the exercise of the rules of Court when the matter is properly before the High Court. If jurisdiction is vested in the High Court then O. 66 of the Rules of the High Court 1980 provides for the manner of its exercise. As learned Counsel for the respondent rightly (in my opinion) observes that O. 66 r. 1 provides the mechanism by which such an application can be made. To quote Lord Davey in *Barraclough v. Brown* (*supra*) at p. 624:

> It would obviously be incompetent for the Judges or the Rule Committee under a power to make rules of procedure to give the Court power to deal with a matter which is outside its jurisdiction. The rule relates to procedure only and must be so construed.

For the above reasons, I would allow the appeal, set aside the judgment of Harun J as well as the Court Order dated 16 December 1985.

I would also award costs to the appellant both here and below to be taxed. The deposit of RM500 to be refunded to him forthwith.

Eusoffe Abdoolcader SCJ:

The Chief Justice, Malaya made an order on 16 December 1985 under the provisions of O. 66 r. 1 of the Rules of the High Court 1980 ('the RHC') on an *ex parte* application by the respondent, the Attorney-General of Hong Kong, pursuant to a letter of request from the Supreme Court of Hong Kong, for the examination of 44 witnesses and production of documents for the purposes of criminal proceedings instituted in Hong Kong with consequential directions in relation thereto. The appellant's application to set aside this order was dismissed by Harun Hashim J on 20 December 1985 *a quo* this appeal emanates. At the outset of the hearing we allowed an application by Lorrain Esme Osman, the other party to the respondent's substantive *ex parte* application, to intervene in this appeal before us.

The pivotal point in the argument of Mr. Sethu for the appellant, and this was adopted in toto by Mr. Murthi for the intervener, is that the High Court has no jurisdiction to make an order under O. 66 of the RHC in relation to criminal proceedings and he refers to the provisions of O. 1 r. 2(2) and (3) of the RHC in this regard and also relies on a contention to the effect that there is no statutory source or enabling provision to empower the Court to order evidence to be recorded for the purposes of criminal proceedings in a foreign Court.

Order 66 r. 1(1) of the RHC provides that the Registrar may subject to one qualification exercise the power of the High Court or a Judge thereof to make, in relation to a matter pending before a Court or tribunal in a place outside the jurisdiction, orders for the examination of witnesses and for attendance and for production of documents and to give directions. Paragraph (2) of r. 1 however specifically excepts the power of the Registrar to make such an order if the matter in question is a criminal matter. The phrase 'in relation to a matter' in r. 1(1) of O. 66 ineluctably connotes the application of that Order to criminal as well as civil matters, as, although 'matter' is not defined in the RHC, the latter were enacted under the Courts of Judicature Act 1964 Act (`the 1964 Act') and constitute subsidiary legislation thereunder, and the definition of 'matter' read with that of 'proceeding' in s. 3 of the 1964 Act which clearly includes criminal proceedings applies equally to the provisions of the RHC by virtue of s. 21(1) of the Interpretation Act, 1967 (which applies thereto pursuant to s. 2(1)(e)thereof) which provides that terms and expressions used in subsidiary legislation have the same meaning as in the written law under which it was made. The provisions of para. (2) of r. 1 furthermore wholly substantiate this construction by specifically excepting, the power of the Registrar to make such orders in relation to criminal matters.

It is now however necessary to turn to a consideration of the provisions of O. 1 rr. 2(2) and (3) of the RHC. Rule 2(1) provides that subject to para. (2) and (3) the RHC shall have effect in relation to all proceedings in the High Court but para. (2) enacts *inter alia* that they shall not have effect in relation to any criminal proceedings. Paragraph (3) however stipulates that nothing in para. (2) shall be taken as affecting any provision of any rules (whether made under the 1964 Act or any other written law) by virtue of which the RHC or any provisions thereof are applied in relation to any of those proceedings. Mr. Sethu contends that para. (3) of r. 2 cannot pertain to the provisions of O. 66 as that paragraph contemplates legislation outside the RHC. I think this contention is a fallacy as the reference to 'any rules' before the parenthesis in that paragraph must *ex necessitate rei* include the RHC themselves as well, since any other construction would emasculate and indeed negate the validity of vital portions of the RHC as, for example, O. 52 which provides for committal for contempt and specifically relates and refers to criminal proceedings and O. 54 in relation to applications for the writ of *habeas corpus*. When I put this to Mr. Sethu he was hard put to give any effective answer. I would emphasise that O. 1 r. 2 (3) in specifically providing an exception to the provisions of para. (2) of that rule categorically permits the application of the RHC **or any provisions thereof** in relation to the proceedings specified in para. (2) of r. 2.

To advert now to the question of statutory source or enabling provision for the enactment of O. 66, I would refer to the provisions of s. 16 of the 1964 Act for Rules of Court to be made (by the Rules Committee constituted under s. 17 of the 1964 Act) for the purposes specified therein, and para. (*l*) whereof states:

> (*1*) for regulating the taking of evidence before an examiner or on commission or by letters of request, and for prescribing the circumstances in which evidence so taken may be read on the trial of an action'.

It is abundantly clear that the statutory source and enabling provision for O. 66 is s. 16 (*l*) of the 1964 Act. Mr. sethu however submits that the reference to 'action' in s. 16(l) must necessarily connote that that paragraph pertains to civil proceedings only and does not apply to criminal proceedings by virtue of its definition in s. 3 of the 1964 Act which specifically excludes a criminal proceeding. In answer to me as to the significance of the comma after the words 'letters of request' in para. (*l*) of s. 16 he says it does not in any way affect the position. I wholly reject this contention. Its punctuation forms part of any statutory enactment

and may be used as a guide to interpretation. The day is long past when the Courts would pay no heed to punctuation in any written law (*Hanlon v. Law Society* [1981] AC 124 (at pp. 197-198 per Lord Lowry), and the presence or absence of a comma may be highly significant (*Re Steel* (*deceased*), *Public Trustee v. Christian Aid Society* [1979] Ch 218; *Marshall v. Cottingham* [1981] 3 All ER 8 (at p. 12). Section 16(*1*)of the 1964 Act must in my view be read disjunctively in the light of the comma I have referred to which is significantly followed by the conjunction 'and'. The provisions of para. (*1*) of s. 16 relating to the regulation of the taking of evidence by letters of request apply equally to civil and criminal proceedings, and the provisions of s. 20 of the Extradition Ordinance 1958 do not in any way detract from the position I have indicated.

Mr. Sethu submits that quite apart from the specific provisions of para. (o) of s. 16 of the 1964 Act which enable rules to be made for amending, altering, or adding to the forms set out in any written law relating to criminal procedure, the Rules of the Court made under s. 16 must necessarily all relate to civil proceedings only, but he had immediately to resile from this stance when I drew his attention to the provisions of para. (a) of s. 16 and the reference therein to the regulation and prescription of the procedure and practice in all causes and matters whatsoever in the High Court and Supreme Court and the definitions of 'cause', 'matter' and 'proceeding' in s. 3 of 1964 Act which include criminal proceedings. Mr. Sethu again in answer to a question posed as to the statutory source for O. 66 of the RHC in relation to civil proceedings submits that this is to be found in the Federated Malay States Civil Procedure Code of 1918 - an enactment long since repealed. I would think that Mr. Sethu's argument that there is no statutory source for the provisions of O. 66 of the RHC to apply to criminal proceedings as well in order to maintain any consistency in the tenor of his contention. When asked what was the statutory source, for instance, for rules made under the provisions of para. (h) of s. 16 of the 1964 Act for regulating the joinder of parties, he was again hard to put to make any effective or satisfactory response.

The particular provisions of para. (*l*) of s. 16 of the 1964 Act considered in the light and against the background of the general provisions of para. (a) of that section for the regulation and prescription of curial procedure in all causes and matters whatsoever must necessarily in my view be the statutory source and enabling provision for the enactment of O. 66 of the RHC for the purposes of obtaining evidence for foreign Courts in both civil and criminal proceedings. This legislative provision clearly relates to a matter of practice and procedure with no question arising of creating or altering substantive rights or of any rules made pursuant thereto purporting *per se* to confer jurisdiction where none existed otherwise, and it is this specific enactment in the 1964 Act that enables the necessary rules to be spelt out to regulate the procedure for the purposes specified therein. I would add that the reference to letters of request in para. (*l*) of s. 16 clearly connotes the taking of evidence in aid of foreign Courts in relation to matters pending before them.

I accordingly hold that O. 66 of the RHC is valid and properly enacted in relation to both civil and criminal proceedings and the order made on 16 December 1985 is *intra vires.*

Mr. Nicholls for the respondent submits in the alternative and perhaps *ob majorem cautelam* that the enabling provision empowering the enactment of O. 66 of the RHC in relation to both civil and criminal proceedings would be the United Kingdom Evidence by Commission Acts 1859 and 1885 and has taken us through a maze of legislation including primarily the Malayan Union Order In Council, 1946 and the Federation of Malaya Agreement, 1948 to substantiate his point. In view however of the conclusion I have arrived at with regard to s. 16 of the 1964 Act, I do not think it necessary to deal with this aspect except perhaps only

to observe *en passant* that I am not satisfied that the imperial legislation referred to is in fact existing law within the connotation thereof in Articles 160 and 162 of the Constitution of Malaysia, particularly having regard to certain pertinent provisions in the constating instruments we have been referred to which I do not think it is however necessary to delve into.

The only other ground of appeal is that for O. 66 of the RHC to apply there must be pending proceedings in the foreign Court in question and the affidavit filed in these proceedings does not in fact disclose this. Although perhaps the affidavit of Stone in support of the *ex parte* application in the High Court and the affidavit of Robey filed in the Supreme Court of Hong Kong and exhibited to Stone's affidavit could perhaps have been more happily drafted and disclosed the position more clearly, I find that there is in fact sufficient indication of pending proceedings in Hong Kong in Stone's affidavit and the order of 11 December 1985 made by the Supreme Court of Hong Kong where reference is made to criminal proceedings instituted in Hong Kong, and in the amended letter of request addressed to the High Court of Malaysia (sic) where the recital refers to criminal proceedings instituted in Hong Kong on 30 November 1985 in the name of the respondent against the appellant, the intervener, and others, and in Robeys affidavit where the offences alleged to have been committed by the appellant and the intervener are categorized. I am accordingly amply satisfied that the order of 16 December 1985 was made in relation to a matter pending before a Court in Hong Kong.

I would accordingly dismiss this appeal with costs to be paid by both the appellant and the intervener to the respondent and direct the deposit lodged in Court by way of security to be paid out to the respondent to account of his taxed costs.

Also found at [1986] 1 CLJ 377